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No. 10-177

IN THE

Supreme Court of the United States

LISA MILLER

Petitioner,

v.

JANET MILLER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

REPLY BRIEF

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I.

THE PETITION SHOULD BE GRANTED.

This case presents two related, but independent, substantial federal issues: the sovereignty of one state to refuse to *enforce*, as distinct from register, foreign custody orders arising form a same-sex civil union treated as marriage, and whether a receiving a receiving state must enforce foreign custody orders that are patently unconstitutional. The issues are unsettled and ripe for this Court to provide clarity and direction.

If this case did not involve such weighty matters, perhaps one could appreciate the ironic and almost surreal twists that have taken place during the six years of litigation. Unfortunately, when the life of a young child, the rights of her mother, and indeed the most basic principles upon which our government was founded are in jeopardy, it is not to be taken lightly. Several key rulings over the past few years were based on legal and factual fictions, all of which permit Ms. Jenkins to now argue that (i) she is a parent (even though she is not) and (ii) all of Ms. Miller's procedural and substantive rights have been fully and adequately litigated (even though they have not been). Specifically, Ms. Jenkins argues that:

> There is nothing new about how the law of the case doctrine was applied by the Virginia Courts even though it is

the first time in Virginia's history that the law of the case doctrine was applied to bar litigation of an issue that was not (and could not have previously been) litigated in the prior litigation between the parties, transforming the law of the case doctrine to law of the *cases* (Pet. at 35-36);

The question of whether Virginia must *enforce* the foreign custody order was previously decided by the Virginia courts even though *Ms. Jenkins* specifically chose *not* to litigate the question in prior litigation, as the statute gives her the ability to do, and the prior Virginia decisions spoke only to registration and full faith and credit, which is distinct from the issue of enforcement (Pet. at 34); and

Ms. Miller had waived her constitutional argument in Vermont because the Vermont Supreme Court said she had, even though Ms. Miller properly preserved the argument for appeal, as she specifically pointed out on her motion for rehearing to the Vermont Supreme Court, which the court nevertheless denied, perhaps because the Vermont Supreme Court had stated in its original opinion that

> even if the issue had properly been raised it was irrelevant (Pet. at 118a).

Each of these arguments rests on factual and legal fictions in which the courts changed the meaning of legal doctrines or terms and expected Ms. Miller to accede to their attempt to change legal reality. The various rulings are reminiscent of an exchange between Humpty Dumpty and Alice in *Through the Looking Glass*:

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."

Lewis Carroll, *Through the Looking Glass*, chp. VI (1969).

In this case, the Virginia and Vermont courts have attempted to change the meanings of two legal doctrines ("law of the case" and "waiver") and one legal term ("full faith and credit"). Because the law of the case doctrine was applied by the Virginia courts in a way never before applied, the opinion below does not rest on an independent and adequate state law ground that has been strictly or regularly followed (Pet. at 35-37). As a result, this Court can and should grant certiorari to address

the merits of the significant constitutional issues at stake.

In addition to the factual and legal fictions that lie at the foundation of this case, Ms. Jenkins makes several arguments that are legally inaccurate or misleading, including that:

> Res judicata prevents litigation of the enforcement issue even though the enforcement issue was not litigated in prior litigation because Ms. Jenkins chose only to litigate the issue of registration (full faith and credit) (Opp. at 12 n.5);
>
> The prior decisions concluding that Virginia is required to give full faith and credit to the foreign custody order somehow answer the separate and distinct issue of whether Virginia must *enforce* the order (Pet. at 17-24);
>
> Congress has constitutional authority to mandate enforcement, as distinct from registration (full faith and credit), because Congress says it has such authority (Pet. at 17-24); and
>
> Several other courts have already concluded that the PKPA preempts conflicting state custody laws, omitting key information that those decisions did *not* involve custody

> decisions between same-sex couples, which implicate unique issues in light of the federal DOMA and state statutes and amendments passed consistent with DOMA (Opp. at 24 & n.12).

This Petition should be granted to resolve important questions of federal law that have not been, but should be, decided by this Court concerning the scope and effect of the full faith and credit obligation in the context of a State's obligation to *enforce* a patently unconstitutional foreign child custody order arising out of a same-sex relationship.

II.

THIS COURT SHOULD NOT DISMISS THE PETITION ON THE GROUNDS OF THE FUGITIVE DISENTITLEMENT DOCTRINE.

At the outset, it bears emphasis that application of the Fugitive Disentitlement Doctrine ("the Doctrine") by an appellate court is discretionary, not mandatory. For the reasons set forth below, we urge this Court to decline to exercise its discretion to dismiss the Petition on this basis.

A.

The Doctrine Should Not Be Applied Under the Facts of This Case.

None of the cases cited by Ms. Jenkins involved application of the Doctrine against the fit, biological parent in a custody or visitation dispute *with a third party* when the biological parent objects to visitation (or custody) in favor of the third party. *But see In re Morrell*, 189 N.E.2d 873 (Ohio 1963) (grandparents had custody, with visitation to biological parents, pursuant to stipulated agreement between the parties). To apply the Doctrine to the facts of this case would be an *expansion*, not a mere *application*, of the Doctrine in a case where the underlying order patently violates Ms. Miller's fundamental rights.

Other courts have recognized the unique concerns presented when applying the Doctrine to a case implicating parental rights. "[A]pplying the fugitive disentitlement doctrine would impose too severe a sanction in a case involving parental rights. Parenthood is one of the greatest joys and privileges of life, and, under the Constitution, parents have a fundamental interest in their relationship with their children." *Walsh v. Walsh*, 221 F.3d 204, 216 (1st Cir. 2000) (citing *Troxel v. Granville*, 530 U.S. 57 (2000)); *see also March v. Levine*, 136 F. Supp. 2d 831, 859 (M.D. Tenn. 2000) (quoting favorably the language from *Walsh*). Application of the Doctrine to this case would be particularly harsh insofar as the heart of Ms.

Miller's case is her request that this Court not enforce a Vermont order that stripped her of her fundamental rights as Isabella's sole, fit, biological parent without first engaging in the constitutional analysis required by due process.

An order like the one issued by the Vermont courts in this case, which grants Ms. Jenkins parental rights without affording Ms. Miller's preference *any* weight whatsoever, plainly violates Ms. Miller's constitutional rights. To dismiss this appeal on the question of whether the Vermont visitation order, which treats Ms. Jenkins as a co-equal parent to Isabella, can be enforced in Virginia compounds the harm already caused to Ms. Miller by virtue of the unconstitutional Vermont orders.

This Court's decision in *Degen* is instructive. *See Degen v. United States*, 517 U.S. 820 (1996). In *Degen*, this Court considered the question of "whether a United States District Court may strike the filings of a claimant in a [civil] forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution" pursuant to the Fugitive Disentitlement Doctrine. 517 U.S. at 821. In 1988, a federal grand jury had indicted Degen for distributing marijuana, laundering money, and related crimes. That same day, a federal district court also unsealed a civil forfeiture complaint where the government sought to forfeit properties worth $5.5 million that were alleged to have been purchased with proceeds of Degen's drug sales or used to facilitate the sales. Degen had moved to Switzerland in 1988 and

refused to return to the United States to face criminal charges. He did, however, file an answer in the civil forfeiture suit. Invoking the Fugitive Disentitlement Doctrine, the district court granted the government's motion to dismiss Degen's filings and entered summary judgment against him. In reversing the order, this Court explained:

> The right of a citizen to defend his *property* against attack in a court is corollary to the plaintiff's right to sue there. For this reason we have held it unconstitutional to use disentitlement similar to this as punishment for rebellion against the United States, or, in at least one instance, for contempt of court. We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process. It remains the case, however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked.

517 U.S. at 828 (emphasis added) (citations omitted). While admitting that there was some appeal to the idea that rough justice requires a litigant to "take the bitter with the sweet, and participate in the District Court either for all purposes or none," this Court nevertheless concluded that applying the Doctrine to Degen "would be too rough." *Id.* at 829.

If the rough justice was too harsh in *Degen* because it would have resulted in his losing the ability to "defend his *property*," how much more egregious is rough justice that would strip Ms. Miller of her ability to defend her constitutional rights concerning *her only child*. Dismissing Ms. Miller's appeal under these circumstances, with the due process arguments raised in the appeal, would violate due process guarantees and simply be "too rough."

B.

The Best Interests of the Child Dictate that the Doctrine Not Be Applied to this Case.

In all custody cases, "the best interests of the child are paramount and form the lodestar for the guidance of the court." *Florio v. Clark*, 277 Va. 566, 570, 674 S.E.2d 845, 847 (2009). That should not change even though the present question is whether to dismiss Ms. Miller's appeal under the Doctrine. *See, e.g., D.C. v. D.C.*, 988 So. 2d 359 (Miss. 2008) (even in a fugitive disentitlement case, the best interest of the child is the "polestar consideration"). The Virginia Supreme Court explained in *Florio* that "in a custody dispute between a parent and a non-parent, the law presumes that the child's best interests will be served when in the custody of its parent." *Id.* This Court has similarly found that "there is a presumption that fit parents act in the best interests of their children . . . . [S]o long as a parent

is fit, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69; *see also Stadter v. Siperko*, 661 S.E.2d 494, 497 (Va. Ct. App. 2008) (quoting *Troxel*).

It is in Isabella's best interest that Ms. Miller be permitted to press her appeal that seeks vindication of her parental rights and of Virginia's sovereign authority to define marriage and family as it has in its Code and Constitution. Surprisingly, Ms. Jenkins does not confront the well-settled Virginia and Supreme Court precedent that the law presumes, in a custody dispute between a parent and a non-parent, that the child's best interests will be served when in the custody of her parent. Rather, she asks this Court to dismiss the Petition of the child's only fit, biological parent because the biological mother did not turn her only child over to a third party who has no biological or adoptive relationship whatsoever to the child. The best interest of the child dictates that the mother's arguments concerning enforcement of a Vermont order that would be declared void if it had been rendered within the borders of Virginia be heard and decided by this Court. While Ms. Miller is not asking this Court to conduct a best interest analysis in order to modify the Vermont custody order, the best interest of the child is relevant to this Court's determination of whether to exercise its discretion to dismiss the biological mother's Petition.

C.

The Doctrine Should Not Be Applied to this Case Given the Significant Public Policy Issues at Stake.

Public policy and equity weigh against dismissal of the Petition in this case where (i) Ms. Jenkins is asking Virginia to enforce a Vermont custody order giving her parental rights over another woman's child when that order, under well-established Virginia and United States Supreme Court precedent, is patently unconstitutional, and (ii) enforcement of that order directly conflicts with express language of Virginia's Code and Constitution.

More than six years ago, Ms. Miller filed a pro se form in Vermont, asking to dissolve her civil union. It is only because Vermont allowed nonresidents to travel to Vermont and enter into civil unions that this case even exists. Vermont apparently had little, or no, concern for the obvious interstate conflict issues that would arise because of its decision. Ms. Miller and Ms. Jenkins entered into their Vermont civil union as Virginia residents, while living in Virginia. Ms. Miller gave birth to Isabella in Virginia. Ms. Miller's decision to live in Vermont for thirteen months well after the child was born changed her life, and that of her daughter, forever. Because of those thirteen months, Vermont had exclusive jurisdiction to decide any and all custody and visitation matters for six months after Ms. Miller left the state. Ms.

Jenkins responded to the civil dissolution action in January 2004 by seeking *full* custody of Isabella for herself, with only visitation to Lisa. After Vermont expressly created new parentage law from the bench (conceding that there was no law to cover the situation and then articulating a new rule), the courts there treated Ms. Jenkins as a co-equal parent to Isabella and eventually issued an order purporting to strip Ms. Miller of custody of her child.

Based on *Stadter*, it is clear that Virginia courts would deem such an order a violation of the fit, biological parent's fundamental rights. Based on Virginia's Marriage Affirmation Act and Marriage Amendment, Virginia has declared such an order, which arises out of a same-sex relationship treated as marriage, void and unenforceable. It furthers public policy not to *dismiss* this Petition, but to grant the Petition both to protect and affirm Virginia's decision concerning marriage and family, and also to keep an eight year old child with her sole, biological parent.

It also serves public policy to grant the Petition in order to avoid inconsistent and incorrect decisions in the lower court. While this case is one of first impression in the Commonwealth, and the nation, it is not the last. Courts in other states are already facing similar litigation and have looked to the outcome of this case for guidance. *See, e.g., Ex Parte N.B.*, 2008 WL 2154098 (Ala. Civ. App. May 23, 2008) (addressing the question of whether Alabama had jurisdiction to hear a parentage

petition by the biological mother after a California court had already declared her former partner to be a parent), 2010 WL 2629064, at *5 (Ala. June 30, 2010) (dismissing petition without prejudice stating that "question regarding the [child custody] judgment of the California trial court and its enforceability in Alabama may exist in light of the unequivocal nature of Alabama public policy on the issue presented in this case"); *see also Adar v. Smith*, 597 F.3d 697 (5th Cir.) (full faith and credit required Louisiana to *enforce* New York same-sex adoption decree), *reh'g en banc granted*, 2010 WL 3835126 (Oct. 1, 2010); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 684 n.24 (N.Y. Surr. 2009) (identifying the *Miller* case as the one discussing the interplay between DOMA and PKPA). This Court should give guidance to the states and lower federal courts on the underlying constitutional issues rather than leave to each of those courts the decision of whether to enforce similar foreign court orders based on possible conflicting interpretations of *Baker*'s enforcement exception and the scope of the full faith and credit clause. *Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

For example, the January 4, 2010 Juvenile & Domestic Relations court order registering and enforcing the November 20, 2009 Vermont order relied on a recently decided Virginia case, *Prashad v. Copeland*, 55 Va. App. 247, 685 S.E.2d 199 (2009), which facts are distinguishable from this case, and reduced all of Ms. Miller's enforcement arguments to the short conclusion that "the entire

concept of recognition deems enforcement." *Id.* The decision did not grasp the significant constitutional distinction between *registration/recognition* (full faith and credit), on the one hand, and *enforcement* on the other. Nor did it wrestle with the fact that according to this Court's precedent, Congress lacks authority to mandate enforcement under all circumstances. Given the significant public policy, federalism, and constitutional rights issues implicated in this case, and others like it, the enforcement question needs to be decided sooner rather than later. That is particularly true given the fact that the lower courts are free to impose monetary sanctions and imprisonment for violation of the foreign orders that often patently violate the fundamental parent rights of the fit, biological parent.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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